Supreme Court, U.S.
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No. 061178

IN THE

Supreme Court of the United States

STEPHEN HABAN and ONE PIECE OF REALTY LOCATED AT 5800 S.W. 74TH AVENUE, MIAMI, FLORIDA, More Particularly Described as Lot 3, Block 3,of Camner Estates According To the Plat Book 58 at Page 21 of the Public Records of Dade County, Florida Together with All Appurtences Thereto and All Improvements Thereon,

Petitioners,

-vs.-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROY D. WASSON
Counsel of Record
WASSON & ASSOCIATES, CHARTERED
1320 S. Dixie Highway, Suite 450
Miami, Florida 33146
(305) 666-5053

Attorneys for Petitioners

QUESTIONS PRESENTED

I. Whether the ostensibly-consensual, unexpected warrantless search of a criminal suspect's home—while the suspect stands naked on his front porch in broad daylight, dripping wet from having been summoned from the shower, wrapped only in a towel, surrounded by police—violates the suspect's Fourth Amendment rights.

II. Whether the Eleventh Circuit violated Haban's due process rights by applying the law of the case doctrine in a clearly erroneous fashion, denying full faith and credit to the state suppression ruling.

III. Whether this Court should limit its holding in *United States v. Raddatz* and require district judges to conduct an evidentiary hearing de novo where the magistrate judge recommends denial of a motion to suppress physical evidence based on contested credibility determinations.

PARTIES TO THE PROCEEDING BELOW

Haban, Stephen, Petitioner

One Piece of Real Property Located at
5800 S.W. 74th Avenue, Miami, Florida, Petitioner

United States of America, Respondent

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REPORTS OF OPINIONS BELOW

The opinion of the Eleventh Circuit giving rise to this petition is *United States v. One Piece of Real Property Located at 5800 S.W. 74th Avenue, Miami, Florida*, No. 05-12550; 182 Fed. Appx. 921; 2006 U.S. App. LEXIS 12993 (11th Circuit May 25, 2006)(unpublished opinion). *See* A-1

An earlier reported opinion in this case is *United States v. One Piece of Real Property Located at 5800 S.W. 74th Avenue, Miami, Florida*, 363 F.3d 1099 (11th Cir. 2004). *See* A-7.

STATEMENT OF BASIS FOR JURISDICTION

The judgment sought to be reviewed was entered by the Eleventh Circuit on May 25, 2006. There was a timely petition for rehearing that was denied by order entered on November 16, 2006. The mandate has been stayed until disposition of this petition. This Court has jurisdiction to review by certiorari the judgment in question pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amend IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. Amend. V:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 1738:

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

A. Course of Proceedings and Dispositions

1. Introduction:

This is a petition for certiorari taken from the Eleventh Circuit's judgment affirming the district court's final summary judgment in a civil forfeiture action. A-1 The Government seized the Defendant home owned by the Petitioner, Stephen J. Haban, following a warrantless search made on June 15, 2001 by a team of both state and federal law enforcement agencies.The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

Haban filed motions to suppress physical evidence, admissions and statements, asserting that such evidence was obtained by unlawful search and seizure, in that the agents had no warrant and his purported consent was involuntarily

obtained. R.34; R.35.

In the related criminal case in the Florida state court arising out of the same search and seizure which led to this forfeiture action, by order rendered on January 14, 2003, the court granted Haban's motion to suppress physical evidence and motion to suppress Defendant's statements, expressly finding that the warrantless search and seizure of the subject property was performed without consent in violation of Haban's constitutional rights. A-18.

2. The Erroneous Summary Judgment By Default:

The Government filed its Motion for Summary Judgment with supporting memorandum of law on November 27, 2002. In his Report and Recommendations entered on January 24, 2003, following the federal suppression hearing, the magistrate judge recommended that Haban's motions to suppress (which were virtually identical to the state motions to suppress) be denied. R.54.

Before the time expired for Mr. Haban to object to the magistrate's report and recommendations, the district judge entered an order granting the Government's motion for summary judgment "by default" due to prior counsel's failure to file a written response. R.58. The Eleventh Circuit reversed that summary judgment. *United States v. One Piece of Real Property Located at 5800 SW 74th Avenue*, 363 F.3d 1099 (11th Cir. 2004)(*Haban I*), holding that a final summary judgment could not properly be entered by default when the record contained evidence which would create a genuine issue of material fact. A-7.

The Eleventh Circuit in *Haban I* held that evidence in the record, including the deposition of Beth Yannuci Fahmie,

"suggests that the circumstances under which Haban consented to the search may have been coercive." R.81-7. That testimony included Ms. Fahmie's testimony, quoted by the Eleventh Circuit that:

> when Haban "went to sign the [form]", the police said "no, no, no, not there," and had him re-sign it. Apparently Haban began to sign the blank that indicated a refusal to waive his rights and consent to the search. The police, however, allegedly stopped him, and only then did he sign the blank indicating that he was aware of, and waived, his rights. These facts, if true, indicate that the search was not consensual and that its eventual occurrence was, therefore, illegal.

R.81-8.

3. Proceedings After Remand:

After reversal of the summary judgment entered by default and remand for further proceedings, the Government responded to Haban's objections to the magistrate's report and recommendations that the motions to suppress be denied. R.82. In that response the Government conceded that "[a] district judge must review a magistrate judge's factual finding *de novo* when an objection is made." R.82-3. However, the Government argued that a new evidentiary hearing was not warranted by the law or the factual circumstances of this case. *Id.* The Government argued that the magistrate judge had appropriately determined the credibility of the conflicting witnesses, and that the district court had no obligation to re-hear the testimony from those witnesses. R.82-5.

The district court entered an order adopting the

Magistrate's Report and Recommendation that the motions to suppress be denied. R.82. That order makes no factual findings concerning the issue of whether Mr. Haban voluntarily consented to the search. *Id.*

The Government then renewed its motion for summary judgment. R.85. The district court again prematurely granted the Government's motion for summary judgment before the original time period for filing a response to that motion had expired. R.88. The Government filed its motion for entry of final judgment of forfeiture. Mr. Haban timely filed his motion for reconsideration of the order granting summary judgment. R.95. No final judgment having been entered, Mr. Haban also filed a motion to reconsider ruling on motions to suppress and for a *de novo* evidentiary hearing. R.94. Mr. Haban also filed his motion for leave to file supplemental pleading attempting to raise the defense of collateral estoppel. R.92. A proposed supplemental answer accompanied that motion. R.93.

The district court by its order entered on April 1, 2005 denied Haban's motion to reconsider and granted the Government's motion for final judgment of forfeiture. R.97. The district court rejected the argument "that the federal government was collaterally estopped from re-litigating the state court rulings on the motion to suppress," citing the Eleventh Circuit's statement in *Haban I* that "federal courts . . . are not bound by the state court's decision." R.97 (quoting *Haban I,* 363 F.3d at 1101.

Haban timely appealed the district court's judgment of forfeiture. R.99. The district court granted his motion for stay of execution pending appeal. R.106.

The Eleventh Circuit affirmed the summary final judgment of forfeiture. A-1. That court rejected Haban's

argument that the search was involuntary, holding: "Because the police officer's testimony was not exceedingly improbable, the district court did not err in finding her credible, and, thus, did not err by finding that Haban voluntarily consented to the search of his home." *Haban II* at A-3.

The Eleventh Circuit rejected Haban's argument that the district judge should have conducted a new evidentiary hearing, holding: "Because the Supreme Court has held that a district court is not required to conduct a de novo evidentiary hearing when a party objects to a magistrate's recommendations, the district court did not abuse its discretion by denying Haban a de novo evidentiary hearing." *Haban II* at A-4.

Finally, rejecting Mr. Haban's position that he should have been allowed to defend the forfeiture on the ground that the state court ruling suppressing the evidence collaterally estopped the re-litigation of the consent to search issue, the court below stated: "Because this Court held, in an earlier appeal in this case, that a state court's ruling on a motion to suppress was not binding on the federal court, the law-of-the-case doctrine barred the district court from reconsidering the issue." *Haban II* at A-6.

B. Statement of the Facts:

1. Introduction:

The parties stipulated that the claimant, Haban was the owner of the subject property with standing to contest the lawfulness of the search and seizure. R.77-14. The parties also stipulated that the search and seizure was performed without a warrant. *Id.*

On June 15, 2001 at about 11:00 a.m. detectives from the Miami-Dade County, Florida Police Department Narcotics

Unit and federal agents arrived unannounced at the subject property, Haban's longtime home located in a quiet residential neighborhood in suburban Miami at 5800 SW 74th Avenue. R.77-16. The detectives' purpose in going to that residence was to investigate pursuant to an "initial tip from a confidential informant advising [Detective Fernandez] that the residence was being utilized to grow marijuana." R.77-16. Haban had never been arrested before this incident. R. 77-141. He had never had any contact with the police other than routine traffic stops. *Id.*

Squad members went onto the front porch of the dwelling and knocked on the door. R.77-19. "[A] female voice answered and asked who it was." R.77-19. Detective Donnelly "advised the female voice that it was the police" and informed her that they "needed to speak to whoever was inside. R.77-19. The female voice was that of Haban's girlfriend, Beth Fahmie, who obeyed the police request and fetched Haban from the bathroom, where he was taking a shower. R.77-20.

2. Mr. Haban's Version of the Facts:

Beth Fahmie responded to the knock on the door from the police that morning. R.77-115. Ms. Fahmie went to summon Haban, who was in the shower at the time. R.77-118. "He got out of the shower, put a towel around his waist and went to the door" while still wet from the shower. R.77-118. Haban "cracked the door open slightly but it was pushed a little farther open" and he was "kind of swooped out the door" by one of the police officers. R.77-119.

Ms. Fahmie witnessed Detective Donnelly requesting that Haban sign the consent to search form. "She was explaining that he needed to sign the papers so that they could enter the house." R.77-123. Haban "asked if he could have an

attorney at this time, if he could have a telephone," to which Detective Donnelly "didn't have a response" but to which "[t]he sergeant in the doorway [Halburian] said no." R.77-123. When asked how many times Haban requested an attorney, Ms. Fahmie responded: "Several." R.77-124. The police refused those requests; when Haban asked for an attorney, Detective "Donnelly would turn and look at the sergeant in the doorway," but the sergeant told him "no." R.77-125.

Ms. Fahmie testified that Detective Donnelly prevented Haban from signing the *Miranda* form (Exhibit 2) in the "no" box where he attempted to sign it. R.77-126-27. Detective Donnelly checked the "yes" box on the form and told Haban to sign that box instead of the "no" box. Ms. Fahmie testified "I saw her check the boxes and tell him that this was where he needed to sign." R.77-127.

Ms. Fahmie described the demeanor of the police at the time of the search and seizure as follows: "I would say that they were using their authority to mentally intimidate him, yes." R.77-136. The police told Haban "that he had to stay there, right there on the porch. That he couldn't move until these papers were signed, and if he didn't want to sign them, within four hours they would have a warrant, but he wasn't moving from the table, were their words." R.77-136.

Haban described the events of being summoned by Ms. Fahmie while he was in the shower, and wrapping himself in a towel to go to the door where the police were waiting. R.77-144. Haban asked Detective Donnelly if she had a search warrant and, before she could respond, Sergeant Halburian said that if Haban "didn't open the door, he would break it in with the team." R.77-149.

Haban testified that he started to write his initials "S.H."

in the blank on the Waiver of Rights form which said "no," meaning that he did not understand those rights, when Detective Donnelly stopped him and said, "no, no, I can't sign there." R.77-166. She then "checked off simultaneously all . . . [the yes boxes] and she told [Haban] to sign there." *Id.* Haban testified that he told her that he did not understand his rights and did not understand why he could not have an attorney present. *Id.*

When asked whether he eventually affixed his initials to all of the "yes" lines on the form, Haban answered as follows:

> At that point I—yes, because of the fact that there was no other alternative to my situation. They weren't going to give me an attorney. They weren't going to honor my rights. At that point it may have been a situation where I could be in danger of—they weren't physically hitting me or anything to that effect physically, but they were both verbally and visually intimidating and their positioning around me restricted my ability to get up and go back in my house. And I felt also if I were to try to go back in my house on my own that they would—they would block it. And it was obvious; he [Sergeant Halburian] was at my front door.

R.77-166-167.

Haban testified that Sergeant Halburian ignored Haban's instructions to "[g]et your foot out of my house. You are trespassing." R.77-167. Sergeant Halburian responded in the following manner:

> Sergeant Halburian is very—he is very dry, generic, like it's just direct. No. No, you won't have an attorney. You will sit here until you get a warrant. You cannot have a phone. You cannot have clothes. No. We will tear your house apart with the team and arrest your girlfriend. It's very direct, very generic, and very intimidating because it's a straight mon—it's not a shout, it's just a monotone, just straight to the point, this is the way its happening. And that's why I said it was their way or their way. So if I didn't want to sign that consent to search, I would sit in that space with a towel for four hours. And he told me this, while they would get a warrant and come back and tear my house apart.

R.77-168.

Haban explained the context in which he ultimately signed the consent form as follows:

> You do realize at this point they're asking me for money. I had already asked for an attorney. I started to realize—I lived in Miami—I was born here, lived here my whole life. I've seen the Miami River cops.[1] I've seen the Metro Dade Task Force that would take informants' tips and rip drug dealers off. I have

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[1] "Beginning in 1985 and subsequent years, a group of City of Miami police officers known as the 'river cops' engaged in a pattern of activities which involved 'ripping off' drug dealers and ultimately resulted in the drowning deaths of three drug dealers." *United States v. Diaz*, 916 F.2d 655, 657 (11th Cir. 1990).

> also heard of home invaders with badges.
>
> And these guys were asking me for money, denying me counsel, denying me telephone, denying me clothes, and I started to realize that I may have a serious problem on my hands, that I may be facing another situation, that I could have a physical problem also for me and my girlfriend. It could turn now, if I didn't cooperate, it could turn ugly.

R.78-19.

3. Government's Version of the Facts:

A couple of minutes after the police spoke with Ms. Fahmie, Haban came to the door. Haban was clad only in "a large bath towel" and "appeared that he had just gotten out of the shower." R.77-21. As she had testified in the state court suppression hearing, Detective Donnelly testified before the magistrate judge that once Haban came to the door "and opened the door a little bit . . . [she] could smell the odor of marijuana emanating from the residence." R.77-20. Among the detailed findings made by the state court judge in the suppression order entered in the related criminal case was the finding that "[t]he police claim that when the Defendant [Haban] opened the door they could smell the odor of marijuana . . . . is not credible and is rejected . . . [because] Detective Robbins and a drug sniffing dog . . . entered the residence [but the dog] did not 'alert' upon approaching the door and thus the dog could not smell the marijuana all the officers claimed they could smell." *Id.* at ¶¶ 8 & 19.[2]

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[2] As noted by the state judge in that suppression order "the dog had alerted at several locations within the home." *Id.* ¶ 20.

The detective advised Haban why the police were there, "asked him to step out of the residence . . . and he stepped over to the table that was on the porch." R.77-22. Detective Donnelly testified that Haban "had not a problem with" her request and did not ask to consult a lawyer before walking to the table, wet from the shower and wearing only a towel. R.77-22.

Detective Donnelly testified that she presented Haban with a consent to search form, read it to him, advised him "that he had every right to refuse to sign it if he wished to," made sure that he understood the consent, "and he finally initially signed it." R.77-24.

Before signing that form, Haban "asked what his options were" and Detective Donnelly advised him that he could "either sign this form" or she would "attempt to get a search warrant from a judge." R.77-27. After that explanation, according to Detective Donnelly, Haban signed the consent form. R.77-28.

Detective Donnelly testified inconsistently concerning her recollection whether Haban asked for an attorney prior to consenting to the search. At one point in her testimony she stated: "I'm categorically denying that he asked for an attorney." R.77-73. Later during cross examination, however, Detective Donnelly clearly stated that she could not recall one way or the other whether Haban requested to confer with counsel: "No, I do not remember or recall anything about him asking for an attorney." R.77-74. In a follow-up question, she responded as follows: "I want your answer. Is your honest answer that ***you don't recall one way or the other***? A. ***Yes, sir.***" R.77-75 (emphasis added).

Detective Donnelly was asked whether she had told

Haban that, if he did not consent to the search, the police "would end up getting a search warrant," and she agreed that she "said something probably in those lines, but probably not in that exact verbiage." R.77-76. The Detective agreed that she had testified, at the state court suppression hearing, that she "would have told him the options are ***consent or we get a warrant***." R.77-83-84 (emphasis added).

Once the consent form was signed, Detective Donnelly "started reading to [Haban] *Miranda* rights." R.77-30. When asked to initial the form to indicate whether or not Haban understood his *Miranda* rights, he attempted to place his initials by the word "no." R.77-31. Detective Donnelly testified that she stopped him from initialing no, discussed the matter further with Haban, and then she, the detective, marked the "yes box" herself. R.77-31.

Detective Donnelly said that, at no time during the search and seizure did Haban express that he was uncomfortable or embarrassed by his appearance covered only by a wet towel. R.3 at 34. Detective Donnelly did not recall Ms. Fahmie making any request for clothes for Haban during that period. R.77-35. The officers found marijuana in the residence and some photographs of prior harvests. R.77-38. The police found cash totaling $45,000 in the house. R.77-40. R.77-68.

4. State Court Finds Illegal Search and Seizure:

By order dated January 7, 2003, the state court judge in the criminal case which arose out of this same set of circumstances, suppressed the tangible evidence and statements made by Haban on the ground that the search was nonconsensual and Haban's Fourth Amendment and *Miranda* rights had been violated. After hearing the same witnesses who

testified in the federal suppression hearing, the state judge held that he "specifically finds all testimony which is inconsistent with these findings to not be credible or worthy of belief." R.59-12, Ex. at n.3; A-6.

The state court judge found that Haban's efforts to initial the "no" spaces on the forms presented to him by the police "because he did not wish to waive his rights, is credible and is believed." *Id.* ¶ 15.

The state court judge found that Haban's "freedom of action was deprived in a significant way and that he was thus in custody at the time of his interrogation," thereby giving rise to the protections of *Miranda*, and found that "the totality of circumstances that the consent to search was not freely and voluntarily given and that it was given, at best, because the Defendant acquiesced to the show of authority after he was escorted out of his house, in daylight, in view of his neighbors while virtually naked and surrounded and questioned by both male and female officers." *Id.*

The prosecution filed a notice of appeal from that state court suppression order, but thereafter dismissed the appeal and the criminal case against Haban was dismissed on the merits. *State of Florida v. Haban*, 842 So. 2d 123 (Fla. 2003).

5. State and Federal Identity of Interests:

Although the Eleventh Circuit affirmed the district court's denial of leave to plead that the state court's suppression order collaterally estopped the Government from re-litigating the illegal search and seizure issue (and, hence, precluded development of the facts concerning the privity element of the collateral estoppel defense), there was evidence of an identity of interests between the State of Florida and the federal

government in the two cases arising out of the subject incident.

The Government's complaint in this forfeiture action established that the United States and the State of Florida were acting in concert, when it states that this was a ***federal*** investigation in which state narcotics agents participated along with DEA agents, as follows: "[A] Drug Enforcement Administration (hereinafter ***"DEA"*) *investigation was initiated*** .... Pursuant to the investigation, DEA agents and members of the Miami-Dade narcotics unit traveled to 5800 S.W. 74th Avenue, Miami, FL 33143 and knocked on the door of the defendant property." R.1-2 (emphasis added). The Government also signed a Joint Scheduling Report in which it stated that one of the "uncontested facts" in the case was that "the defendant property was searched by state and federal law enforcement." R.11-4. The Eleventh Circuit in *Haban I* noted the collaboration between state and federal law enforcement: "In June 2001, the Drug Enforcement Agency and Miami-Dade police officers initiated an investigation into possible marijuana cultivation and distribution activities at the house of Stephen Haban, the defendant." 363 F.3d at 1100.

Detective Donnelly testified that the Miami-Dade Police Department had a financial interest in the federal forfeiture action if the federal government prevailed in this case. R.77-85. The state and federal agencies had agreed before the raid on Haban's house to share a percentage of the forfeiture proceeds. *Id.*

Haban's affidavit established that he was questioned simultaneously by both federal and state agents during the subject incident. R.65-17, Ex. B.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE OSTENSIBLY, CONSENSUAL, WARRANTLESS SEARCH OF HABAN'S HOME—WHILE HE STOOD NAKED ON HIS FRONT PORCH IN BROAD DAYLIGHT, DRIPPING WET FROM HAVING BEEN SUMMONED FROM THE SHOWER, WRAPPED ONLY IN A TOWEL, SURROUNDED BY POLICE—VIOLATED HIS FOURTH AMENDMENT RIGHTS.

A. Introduction:

The Fourth Amendment exclusionary rule applies in civil forfeiture actions. *E.g., One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). It is the general rule that "warrantless searches are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions," including consent[3] to search. *United States v. Gonzalez*, 71 F.3d 819, 825-27 (11th Cir. 1996).

"The Government bears the burden of proving both the existence of consent and that the consent was not a function of acquiesence to a claim of lawful authority but rather was given freely and voluntarily." *United States v. Blake*, 888 F.2d 795, 798 (11th Cir. 1989). Here the district court clearly erred in adopting the magistrate's findings that Haban voluntarily consented to the search of the subject property.

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[3] In this case, the only exception to the warrant requirement offered by the Government below was consent.

B. Standards for Determining Existence of Voluntary Consent:

The question whether consent was voluntary is a factual finding that "depends on the totality of the circumstances." *United States v. Purcell*, 236 F.3d 1274, 1281 (11th Cir. 2001). "In evaluating the totality of the circumstances underlying consent, the court should look at several indicators, including the presence of coercive police procedures, the extent of the defendant's cooperation with the officer, the defendant's awareness of his right to refuse consent, the defendant's education and intelligence, and the defendant's belief that no incriminating evidence will be found." *Id.*

Haban notes that the foregoing list is inclusive, rather than exclusive. He submits that the "totality of the circumstances" involved in this case also should include, among other things, the fact that he was interrupted while taking a shower and still dripping wet and was clothed only with a towel while the police were attempting to obtain his signature on the consent form.

C. Evidence That Consent Was Involuntary:

The evidence in the record, including uncontradicted evidence from the Government's own witnesses, established the absence of Mr. Haban's voluntary consent to the search and seizure. Therefore, the motions to suppress should have been granted.

That evidence included the deposition of Beth Fahmie taken by the Government and filed on November 26, 2002. R.43. Ms. Fahmie testified that the police who searched the subject residence that day did so after denying Haban's request

to consult an attorney[4]; insisting that he sign a consent-to-search form; changing his "no" answer on the *Miranda* warning form to "yes"; and threatening "to make us sit there and get a warrant and tear his house apart and arrest [her]." R.43-39-40.

Ms. Fahmie's testimony that Haban asked to consult counsel was not contradicted by the officer who took the lead in questioning him. Detective Donnelly conceded that she could not recall one way or the other or that Haban asked to consult his attorney. R.3-75.

The Government's own evidence concerning Haban's alleged consent to the search was self-contradictory and insufficient upon which to find voluntary consent in the first place. For example, even the Government's own witnesses agreed that Haban "never gave verbal consent" to the search of his home. R.27-30. Contradictorily, however, the written consent-to-search form which Detective Donnelly directed Haban to sign states that he gave both a verbal and written consent to the search. R.78-51. Detective Donnelly admitted that the form was incorrect wherein it stated: "I hereby acknowledge that I previously gave verbal consent to search without warrant by the officers . . . ." R.78-51.

Because a vitally important part of that form—the

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[4] While the denial of Haban's request to consult an attorney may or may not have been a violation of *Miranda* or the Sixth Amendment under the circumstances, the fact that he asked to consult with an attorney in response to the Government's insistence that he consent to the search is doubtlessly relevant to the Fourth Amendment defense. *See generally, e.g., Romero v. Jordan*, No. 02-6058; 56 Fed. Appx. 886, 888 & n.3; 2003 U.S. App. LEXIS 1076 at **6 (10th Cir. Jan. 23, 2003)(in cases where defendants contend "that they were not read their *Miranda* rights prior to executing a consent to search . . . [court has] treated the *Miranda* issue as one factor in determining whether the consent was voluntary").

statement that verbal consent had been given—was admittedly false, the balance of the form containing the purported written consent carries no weight. Moreover, the admitted falsity of the recitation that verbal consent was given is evidence of the involuntariness of Haban's signature that he consented in writing.

Further examples of uncontested facts which establish the lack of consent, or consent which was involuntarily given, include the following:

1. Haban was being questioned while practically naked and dripping from the shower in a position of great vulnerability;
2. Haban was admittedly "nervous" according to Detective Donnelly's testimony;
3. The position of the officers conducting the questioning on Haban's front porch was psychologically intimidating according to Ms. Fahmie's uncontradicted testimony;
4. Detective Donnelly admitted that she had a poor recollection of the events of that day;
5. Haban had no prior police record and no prior contact with police which would render more likely the notion that he knew of his rights to withhold consent to the search;
6. The drug-sniffing dog did not alert when the door was open to Haban's house, casting grave doubt upon the police testimony that they smelled marijuana and doubt on their testimony that Haban's consent was voluntary.
7. Haban testified without contradiction that he was afraid to withhold consent because of the Miami River Cops episode;
8. Detective Donnelly testified to facts which constituted compulsion to provide consent by admitting that she told Haban that the only alternative to consent would be that

she ***would*** get a search warrant, not that she would ***try*** to get a search warrant. R.77-76, 83-84;

9. Haban tried to initial "no" to the question whether he understood his rights on the *Miranda* form, but Detective Donnelly forced him to change that and initial her check marks in the "yes" blanks on the form;

10. Detective Donnelly's testimony was inherently incredible where she indicated that Haban was not uncomfortable while surrounded by male and female police officers conducting questioning of him while he wore only a wet towel;

11. The police were carrying guns.

12. Haban could not have believed the officers would find no evidence of illegal activities, so his only logical motive in ostensibly granting consent was to prevent harm to himself and his girlfriend.

This Court could well find that, under the totality of the circumstances, the Government failed in its burden of establishing that consent was voluntarily given. Therefore, certiorari should be granted.

II.

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE ELEVENTH CIRCUIT VIOLATED HABAN'S DUE PROCESS RIGHTS BY APPLYING THE LAW OF THE CASE DOCTRINE IN A CLEARLY ERRONEOUS FASHION, DENYING FULL FAITH AND CREDIT TO THE STATE SUPPRESSION RULING

This Court should grant review to consider whether Haban was denied due process when the Eleventh Circuit held that "the law-of-the-case doctrine barred the district court from reconsidering the issue [of collateral estoppel]." See *Haban II* at A-6. The Eleventh Circuit's earlier statement in a footnote

in *Haban I* that "[f]ederal courts are not bound by the state court's decision"[5] on a motion to suppress was clearly erroneous, as both the common law and the Full Faith and Credit Statute require federal courts to honor state court suppression rulings where the elements of collateral estoppel are met.

The Eleventh Circuit applied language from this Court's decision in *Elkins v. United States,* 364 U.S. 206 (1960) to support its disregard of the effect of the state court's judgment in Haban's favor based on the Fourth Amendment violation and resulting suppression of evidence. However, *Elkins* did not involve a situation where collateral estoppel was applicable. In actuality, "a federal court must give a state court judgment the same preclusive effect as would be given that judgement under the law of the state in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. Of Educ.*, 465 U.S. 75, 81 (1984). "[U]under the Full Faith and Credit Act a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give." *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986). *See also Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982)[6].

Even where the issue decided by the state court is a federal constitutional issue such as a ruling on a motion to suppress evidence based on a Fourth Amendment challenge, the

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[5] *Haban I*, 363 F.3d at 1101 &n.1; A-8.

[6] Several of this Court's cases on the issue addressing the Full Faith and Credit aspects of the collateral estoppel defense are collected by the author David H. Bathe, in Annot., *Supreme Court's Views as to Res Judicata or Collateral Estoppel Effect of State Court Judgments on Federal Courts*, 72 L. Ed. 2d 911 (2005).

Full Faith and Credit Clause requires federal courts to apply collateral estoppel to prevent relitigation of the constitutional issue, where relitigation would be precluded in a subsequent state court action. *E.g., Montana v. United* States, 440 U.S. 147, 155 (1979)(litigating federal constitutionality of state tax in state proceedings collaterally estopped re-litigation of issue in federal court, even though United States was not a party to state action but "had a sufficient 'laboring oar' in the conduct of the state court litigation"); Allen *v. McCurry,* 449 U.S. 90 (1980).

Collateral estoppel frequently is used to prevent parties in civil cases—including federal civil forfeiture cases—from re-litigating state court rulings on motions to suppress. Most of those cases involve use of collateral estoppel to preclude re-litigation by the claimant who was unsuccessful in the state court suppression hearing. For example, in *United States v. $174,206.00 in U.S. Currency*, 320 F.3d 658 (6th Cir. 2003), the court affirmed the district court's denial of the claimants' motion to suppress, holding as follows:

> First, the district court correctly ruled that the Claimants' motion to suppress was barred by collateral estoppel. The Claimants had made an identical motion in state court, in which they similarly argued that the search warrant supporting the search of their home was based on false statements. The issues were identical, the issue was actually litigated in the first proceeding, and the issue was "necessary and essential to the judgment on the merits."

Id. at 663 (quoting from *United States v. Three Tracts of Property*, 994 F.2d 287, 290 (6th Cir. 1993). *See also, e.g., Anderson v. United States*, 62 Fed. Appx. 883, 885-86 (10th Cir. 2003)).

Although less numerous, some cases have held that collateral estoppel principles can bar further litigation of an issue decided in a criminal defendant's favor. *See Ashe v. Swenson*, 397 U.S. 436 (1970). The collateral estoppel doctrine may be used by the successful state court defendant against the federal government in a later civil or criminal case arising out of the same factual context as the state prosecution. Thus, in those situations involving participation by state and federal law enforcement officers in an illegal search and seizure, collaboration between the State and federal government in connection with the first suppression proceedings in state court, or other circumstances which establish privity between the two governmental entities, the absence of the federal government as a named party to the prior state court proceedings will not preclude use of the collateral estoppel doctrine to conclusively establish illegality of a search, seizure, or interrogation in the later federal action.

Florida follows the principle that "collateral estoppel, or issue preclusion, applies when 'the identical issue has been litigated between the same parties ***or their privies***.'" *State v. McBride*, 848 So. 2d 287, 290-91 (Fla. 2003)(emphasis added). "Under Florida law, collateral estoppel applies if (1) an identical issue, (2) has been fully litigated, (3) by the same parties or their privies, and (4) a final decision has been rendered by a court of competent jurisdiction." *Quinn v. Monroe County*, 330 F.3d 1320, 1329 (11th Cir. 2003). The standard to be applied in determining the collateral estoppel effect of a prior Florida state court ruling on an issue is whether the party against whom collateral estoppel is asserted was "in privity with an actual party." *Balbirer v. Austin*, 790 F.2d 1524, 1527 n.1 (11th Cir. 1986).

A party will be in privity with a litigant from another case when the interests of those two parties were closely

aligned. "Identity of parties is not a mere matter of form, but of substance . . . parties nominally different may be *in legal effect*, the same." *Chicago, R.I. & P. Ry. v. Schendel*, 270 U.S. 611, 620 (1926). In this case, the Government's interest was exactly the same as that of the State of Florida, so collateral estoppel should apply. *See generally, e.g., Sentry Insurance v. FCCI Mutual Life Ins. Co.*, 745 So. 2d 349 (Fla. 4th DCA 1999)(holding that party's insurance company was collaterally estopped by prior judgment in case involving insured because insurer's interests were aligned with those of the insured).

This Court has the power to re-examine the question of the Eleventh Circuit's refusal to grant full faith and credit to the Florida suppression ruling in *Haban I*, notwithstanding the fact that certiorari was not sought within ninety days of that decision. *See Reece v. Georgia*, 350 U.S. 85, 87 (1955)(Supreme Court's "right to re-examine such questions is not affected by a ruling that the first decision . . . became the law of the case"). Similarly, the constitutional infirmity of the *Haban I* footnote rejecting full faith and credit was properly reviewable by the *Haban II* court.

Haban submits that he was denied due process of law by the Eleventh Circuit's holding in *Haban I* that he had to litigate the suppression issue a second time, after having prevailed on that issue in a court of competent jurisdiction against a prosecutor in privity with the United States. The Government should not be given multiple bites at the apple. Therefore, this Court should accept certiorari review and consider the merits of the issue.

III.
THIS COURT SHOULD LIMIT ITS HOLDING IN *UNITED STATES v. RADDATZ* AND REQUIRE DISTRICT JUDGES TO CONDUCT EVIDENTIARY HEARINGS DE NOVO WHERE THE MAGISTRATE JUDGE RECOMMENDS DENIAL OF A MOTION TO SUPPRESS PHYSICAL EVIDENCE BASED ON CONTESTED CREDIBILITY DETERMINATIONS

This Court should grant certiorari to consider whether the district court properly overruled Haban's objections to the magistrate's report without a *de novo* evidentiary hearing. The ultimate determination of whether a search and seizure were reasonable under the Fourth Amendment is subject to *de novo* review. *United States v. Hernandez*, 93 F.3d 1493, 1498 (10th Cir. 1996).

This case is distinguishable from *United States v. Raddatz*, 447 U.S. 667 (1980). In *Raddatz*, the Court held that a district court judge was not required to conduct a *de novo* evidentiary hearing of the magistrate's recommendation on a motion to suppress. Part of the basis for this Court's decision in *Raddatz* is that the ruling on the suppression motion is not necessarily dispositive of the outcome of the case because: "[a] defendant who has not prevailed at the suppression hearing remains free to present evidence and argument to—and maybe to persuade—the jury that the confession was not reliable and therefore should be disregarded." *Id.* at 678.

Unlike the *Raddatz* situation in which the evidence sought to be suppressed is only a confession, in a case involving suppression of physical evidence seized as a result of an unlawful search, there was no possibility of persuading the trier-of-fact that the evidence is "not reliable and therefore should be disregarded." Thus, the character of the evidence

sought to be suppressed renders the reasoning of the Court in *Raddatz* inapplicable here.

Even if the character of the evidence sought to be suppressed in this case do not distinguish it from *Raddatz,* the sharp conflicts in the testimony and importance of weighing the credibility of the witnesses render this a case in which the district court should be required to recall the witnesses, rather than simply reviewing the transcript. *See Raddatz,* 447 U.S. at 694 (Marshall and Brennan, J.J., dissenting)("statutory provision for 'a *de novo* determination of . . . specified proposed findings . . . to which objection is made' . . . should be construed to require the district court to conduct an evidentiary hearing when there are case-dispositive issues of ***credibility*** that cannot be resolved on the basis of the record compiled before the magistrate")(emphasis added).

Here all the objective evidence (including Haban's initials on the "no" blank on the *Miranda* form and the drug-sniffing dog's refutation of the agents' testimony about smelling marijuana) supported Haban's position, not the Government's. In order for the Government's position to be accepted, credibility determinations were of paramount importance. Unless the district court judge can size up the witnesses and adjudge their credibility in person, review of the transcripts alone would not sufficiently protect the Claimant's rights. Principles of due process of law require that a *de novo* evidentiary hearing be afforded to Haban by an Article III judge.

There is no rational basis to require an evidentiary hearing where a district judge disagrees with the magistrate's credibility determination, but not where the district judge agrees with that determination. In each case, the district judge must pass on the credibility issue. That decision cannot be well

accomplished when the court has only the cold record to review instead of the live witnesses. This Court should grant certiorari and limit *Raddatz* to situations in which credibility is not fundamental.

CONCLUSION

WHEREFORE, there being likely violations of the Fourth Amendment, Fifth Amendment, and the Full Faith and Credit Statute, this Court should grant the writ and consider the issues on the merits.

Respectfully submitted,

Roy D. Wasson
Florida Bar No. 332070
Wasson & Associates, Chartered
1320 South Dixie Highway
Suite 450
Miami, Florida 33146
(305) 666-5053 Telephone
(305) 6666-0010 Facsimile